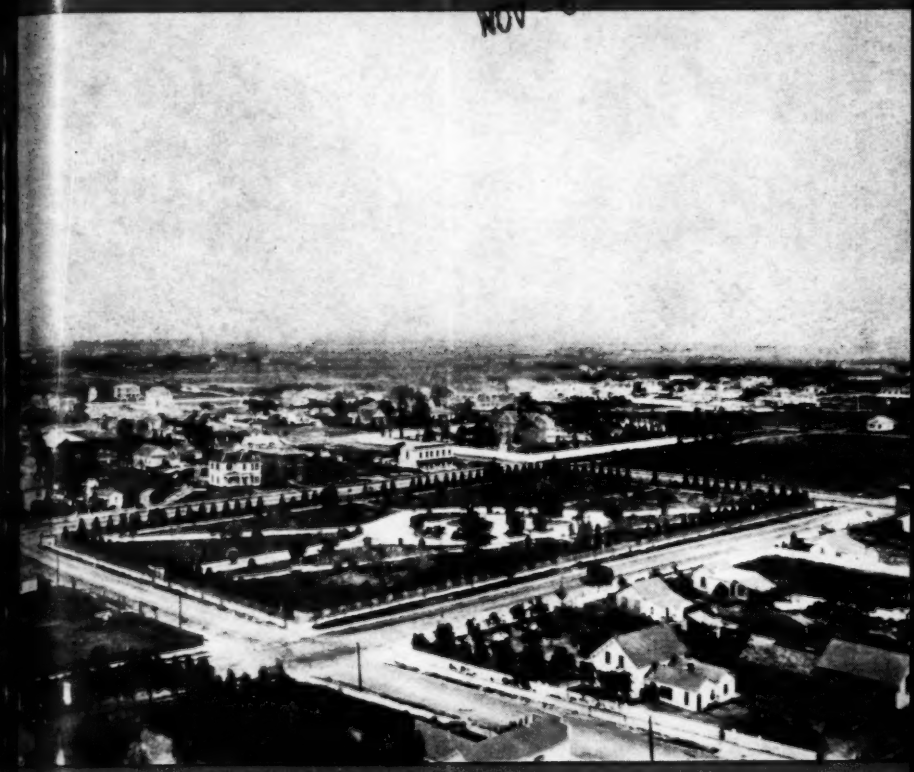

OCT. 1961

The Los Angeles BAR BULLETIN

Vol. 36 No. 12

JUNIOR BARRISTERS ISSUE

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VOLUME 36 • NUMBER 12 • OCT. 1961

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OFFICIAL MONTHLY PUBLICATION OF THE LOS ANGELES COUNTY BAR ASSOCIATION. ENTERED AS SECOND CLASS MATTER OCTOBER 18, 1943, AT THE POSTOFFICE AT LOS ANGELES, CALIFORNIA, UNDER ACT OF MARCH 3, 1879. SUBSCRIPTION PRICE $2.60 A YEAR, 40C A COPY.

JUNIOR BARRISTERS' PAGE

☆ ☆ ☆ ☆ RICHARDS D. BARGER

» » THE GROWTH of the Los Angeles Junior Barristers has reflected the overall growth of not only the Los Angeles County Bar Association, but also the community and State within which we live. From a modest beginning in 1928, under the tutorage of Hubert L. Morrow with a total initial membership of 145, the Junior Barristers now have 1,280 members. While the Bar Association itself has experienced rapid growth, the Junior Barristers have grown more than tenfold.

It is traditional that the Junior Barristers are responsible for one issue of the BULLETIN usually in the Fall. Through the generous contributions of Justice Allen W. Ashburn, the Barristers sponsor an annual essay contest, at which the brighter lights of our group seek to generate a little candle power. The Judges for this year's competition are the Honorable Philbrick McCoy, Judge of the Superior Court; Professor James H. Chadbourn, Connell Professor of Law at the University of California Los Angeles; and Richard E. Davis, Esq., a Senior Partner of the Law Firm of Gibson, Dunn & Crutcher, who graciously substituted when Herbert F. Sturdy, Esq. of that firm was called out of town. We are indebted to them for their efforts in judging this year's contest. A great deal of credit should also go to the Chairman of this month's issue of the BULLETIN, James W. Hamilton and his Committee. His duties not only consisted of putting out this issue, but also as administrator of the Junior Barristers contest. The excellence of this issue reflects his good work.

The winners of this year's competition are as follows: First Prize: Steven A. Bauman, whose essay is entitled: Practical Considerations vs. Tax Aspects of Business Transactions: Should the Tail Wag the Dog? Second Prize: Marcus E. Crahan, Jr., whose essay is entitled: Governmental Tort Responsibility in California. Third Prize: L. C. Waddington, whose essay is entitled: Criminal Discovery and the Alibi Defense.

These prize-winning articles constitute the principal contribution of this month's issue of the BULLETIN and we are proud to present them to you.

The Junior Barristers number among their principal activities monthly meetings on "Bread and But-

ter" subjects of interest to the young practitioner; the conducting of a vigorous membership campaign for the Los Angeles County Bar Association; the staffing and administering of the Federal Indigent Committee, which this year have supplied approximately 250 Lawyers in the defense of indigent defendants in Federal Court; and several social functions among which are the annual Fall Stag and Summer Outing and Picnic.

We, in the Junior Barristers, are always glad to see new faces at our functions, for experience has shown that the new young lawyer is the lifeblood of any bar association and a future leader of the organized Bar. We welcome old and young to our organization and as has been proven in the law of physics, "the strength of a triangle is at its base". The greater the number of young lawyers who are active in our group, the stronger its base will be and a greater service to be rendered to the younger lawyer whom we seek to represent at the organized Bar.

JUNIOR BARRISTERS OF THE LOS ANGELES COUNTY BAR ASSOCIATION

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THIS MONTH'S COVER

The view shown on this month's cover is of City Park (now Pershing Square) with the intersection of Fifth and Olive Streets in the foreground. The photograph was taken in about the year 1880 when this was the residential area of Los Angeles. The photograph is from the collection of historical photographs of the Title Insurance and Trust Company.

Practical Considerations vs Tax Aspects of Business Transactions: Should the tail wag the dog?

by

STEPHEN A. BAUMAN

First Prize Winner
1961 Justice Ashburn
Junior Barristers'
Essay Contest

Mr. Bauman is a native of Los Angeles, California. He received a B.S. degree in accounting from U.C.L.A. in 1956, his L.L.B. from Stanford Law School in 1959, and an L.L.M. degree from Harvard Law School in 1960. He is a member of the Committee on Bulletin and Tax Notes of the Taxation Section of the American Bar Association, and is presently associated with the firm of Willis, MacCracken & Butler in Los Angeles.

» » WHEN ANY BUSINESSMAN contemplates entering into a transaction these days, if he is at all aware of the effect of income taxes he will contact his tax advisor before closing the deal. With the great importance to businessmen of the tax aspects of any transaction, some business advisors have become concerned that tax aspects have assumed an undue weight in shaping financial dealings. It is often said that the tax tail wags the business dog. It is the purpose of this article to indicate how the desire to minimize, defer, or avoid income taxes often causes a businessman to frame a transaction improperly from both an economic and a financial standpoint. In many instances, it is wiser from an economic and financial standpoint not to shape a transaction so as to pay the least amount of income tax, but rather to take more cash, pay the higher tax, and offset the difference in tax by investing in items with greater income or greater appreciation potential, or both. The examples used herein have been taken from the files of actual cases. It is hoped that the analysis presented herein will contain helpful suggestions as to the proper relative weight to be given to the tax incidents and other economic and financial factors which comprise business transactions.

I. Installment Sales

Under Section 453 of the Internal Revenue Code,[1] if a seller in a business transaction receives payments[2] from the purchaser in the taxable year of sale in an amount which is 30% or less of the total sales price, the seller may treat the transaction as an

[1]All references, unless otherwise noted, are to the 1954 Code.

[2]Exclusive of evidences of indebtedness of the purchaser.

installment sale. This means that the seller need include in his gross income only the proportion of the payments that he receives in each taxable year that the total gross profit on the transaction bears to the total sales price. For example, if the sales price is $300,000, and the gross profit to the seller is $100,000, and furthermore, if the seller receives $90,000 or less in the year of sale, he can elect to treat two-thirds of every payment received as return of cost, and need include in gross income only one-third of every payment. This provides a method by which sellers can defer paying tax on a sale which has been consummated until such time as the payments are actually received, and can pay the tax at such time in proportion to the amount of the payments.

In these transactions, very often the seller receives little or no security from the buyer for the payment of the sales price, the security often is inadequate. In such a situation, the question arises as to whether the seller should take more than 30% payment in the year of sale, even as much as 100%, pay the income tax in the taxable year of sale on the entire gain, and invest the proceeds in a way so as to earn a greater return, even after taxes, than the tax the seller would save by going the installment sale route.

In terms of the above example, assume that the seller is married and, aside from the transaction in question, has ordinary income of $16,000 in excess of his deductions and exemptions in each year in question. If he were to take the entire $300,000 in the year of sale, the tax on the $100,000 profit, assuming it is capital gain, would be $25,000.[3] By electing the installment sale route and taking $75,000 in each of four years, the tax on the $25,000 taxable in each year would be $4,835, and the total tax on the $100,000 profit would be $19,340. The tax to be saved by going the installment sale route would thus be $5,660.

In order to save $5,660, the seller takes the chance that the buyer will not be able to fulfill his obligation to pay the full sales price, and that whatever security the buyer has given for the payment of the sales price will not prove adequate to cover the unpaid balance in the event the buyer later defaults.

If the seller were to take 100% of the sales price in the taxable year of sale, he would have an extra $5,660 in income tax to pay, leaving a net of $275,000 ($300,000 sales price, less $25,000 income tax) to invest. He would therefore have $204,835 more during the taxable year of sale than he would have had if he had gone the installment sale route. [The installment sale route would have brought $75,000 gross receipts. The tax would have been $4,835, leaving a net of $70,165. The difference between $275,000 and $70,165 is $204,835.] In order to earn the $5,660 of tax saving in just one year, the difference of $204,835 need earn a return of only 2.7632% after income taxes.

To show the complete picture, let us assume the seller is able to invest his money at a 5% return. Under the installment sale route he would have $70,165 ($75,000 gross receipts, less $4,835 income tax) available each year to invest. Thus, the first $70,165 would earn 5% for 4 years, the second for 3 years, and so on. Under the approach where the seller takes the en-

[3]Since the total taxable income would be $56,000, the alternative capital gains tax would come into play. See footnote 7, infra. The entire capital gain therefore would be taxed at 25%. Int. Rev. Code §1201(b).

tire purchase price in the year of sale, he would have $275,000 ($300,000 sales price, less $25,000 tax) available in the first year to invest at 5%. The comparison would be as follows:[4]

Taxed Entirely in Year of Sale $275,000 at 5% for 4 years earns $55,000	
Installment Route	
$70,165 at 5% for 4 years earns	$14,033
$70,165 at 5% for 3 years earns	$10,525
$70,165 at 5% for 2 years earns	$ 7,017
$70,165 at 5% for 1 year earns	$ 3,508
Total	$35,083

Even after income taxes are considered, the financial and economic impropriety of electing the installment sale route is obvious. Before income taxes, the installment approach results in less than two-thirds of the earning power of the non-installment approach. We have assumed the seller to be in a bracket around 35%; this will leave him with approximately 65% after taxes. Thus the $55,000 would leave about $36,000 after taxes, while the $35,083 would leave about $23,000 after taxes. Even if these figures were adjusted for the effect of the graduated income tax structure, the difference would be quite substantial, and in any event more than double the $5,660 of tax saving of the installment sale route.

II. Reorganization

Under Sections 354 and 368 of the Internal Revenue Code, if the owner of corporate stock sells it to another corporation, and receives only stock in the latter as consideration for the sale, he need recognize no gain on the transaction, if the corporation acquiring his stock owns 80% or more of the stock of his corporation immediately after the sale.

In such a situation, the seller, if he has the opportunity, frequently will attempt to receive only stock of such an acquiring corporation, in order to defer the tax on the gain on the sale until such time as he disposes of the stock in the acquiring company in a taxable transaction.[5]

The main inquiry in such a situation should not be the tax aspects of the transaction. Rather the seller should ask himself two questions. One, is the stock a good investment, compared with what the seller could invest in with after-tax dollars if he were to take cash rather than stock from the seller? In other words, is the company a sound one with good earnings and growth potential, or is it one with only poor appreciation possibilities? Does the company pay cash dividends or only stock dividends, or no dividends at all? Second, the seller should determine, if, in the event he desired to dispose of the stock at a later date, there will be a market for the stock at that time, and indeed, whether the market will be such as to afford him a price which reflects the then fair market value of the stock, or whether he will have to take something less in a forced sale due to his need to dispose of the stock and the lack of a market for it.[6] In this situation, if the taxpayer holds the stock he receives in the exchange until his death, unless there is a stock retirement agreement in effect covering the stock, the federal estate taxes and state inheritance taxes resulting from his death must be paid out of the rest of his estate, if any. This may also re-

(Continued on Page 427)

[4]The effect of compound interest is disregarded. It would make the comparison even less favorable for the installment approach.

[5]If the sale or exchange qualifies as a tax-deferring transaction, the seller carries over his basis of the stock sold or exchanged to the stock received. Int. Rev. Code §358.

[6]In addition, at this point, the taxpayer will have to pay the tax deferred at the time of the original stock for stock exchange. See text accompanying footnote 5, supra.

Governmental Tort Responsibility in California

by
MARCUS E. CRAHAN, JR.
Deputy City Attorney
City of Los Angeles

Second Prize Winner
1961 Justice Ashburn
Junior Barristers'
Essay Contest

Mr. Crahan received his A.B. degree from Claremont College in 1951, his M.B.A. degree from the University of Chicago in 1954, and his L.L.B. from U.C.L.A. Law School in 1956. He is presently in the Main Office, Civil Division, of the Los Angeles City Attorney's Office.

» » ON MARCH 21, 1958, Chief Justice Gibson, speaking for the six justice majority of the California Supreme Court, stated in the case of *Vater v. County of Glenn*, 49 Cal. 2d 815, 820:

"Most of the authorities who have recently written on the subject strongly advocate abolition or modification of the principle of governmental immunity, which lets the loss caused by tortious conduct of government rest on the injured individual instead of distributing it among all members of the community, the benefiiciaries of the governmental activity . . . [citation of authorities]. . . . However, the abrogation or restriction of this doctrine is primarily a legislative matter . . . [citation of authorities] . . ., and, where, as here, the Legislature has clearly expressed its intention to maintain immunity, that intention is controlling."

On January 27, 1961, Justice Traynor, speaking for the five justice majority of the same Court stated in the case of *Muskopf v. Corning Hospital District*, 55 Cal. 2d ...., (55 AC 216, 218, 221, 222-23):

"After a re-evaluation of the rule of governmental immunity from tort liability we have concluded that it must be discarded as mistaken and unjust. • • •

"The rule of govermental immunity for tort is an anachronism without rational basis, and has existed only by force of inertia. • • •

"It is strenuously urged, however, that it is for the Legislature and not for the courts to remove existing governmental immunities. Two basic arguments are made to deny the court's power: first, that by enacting various statutes affecting immunity the Legislature has determined that no further change is to be made by the court; and second,

that by the force of stare decisis the rule has become so firmly entrenched that only the Legislature can change it. Neither argument is persuasive."

Justice Traynor goes on to state, however, that the "official immunity" of public officers and employees in the performance of discretionary functions within the scope of their authority is supported by sound and strong public policy and, therefore, remains undisturbed even if it is alleged that such officers or employees acted maliciously.

It is not the writer's intention to discuss the reasoning or merits of the *Muskopf* decision, although one cannot help but note in passing that Justice Schauer's dissenting remarks seem particularly cogent. (See also Justice Holmes' opinion in the case of *Kawanakoa v. Polybank*, 205 US 349, 353.) Rather, the writer intends to comment briefly upon the present state of governmental immunity in California, and to suggest some possible solutions to this socio-legal problem which has been of such concern to so many students, writers, practitioners and makers of law.

A first thought would be to suggest that the *Muskopf* case is not as far reaching as it would first appear; for as is often the case, the facts may be decisive; and the facts in the *Muskopf* case might have been considered by the Court to have presented a case for common law liability, or for at least a change in the thinking of the Court with respect to the nature (governmental or proprietary) of the function of conducting a public hospital. Thus, in any event the Court might have overruled its former decision in *Talley v. No. San Diego Hosp. Dist.*, 41 Cal. 2d 33, and declared that henceforth the conduct of a public hospital by a governmental agency is a proprietary function.

Moreover, the *Muskopf* case cannot be read or discussed in isolation. It must be weighed and considered with the Court's companion decision in the case of *Lipman v. Brisbane Elementary School Dist.*, 55 Cal. 2d ....., (55 AC 229), wherein speaking for a unanimous court Chief Justice Gibson appears to reveal the true effect of the Muskopf decision when he states (55 AC 233-35):

"In *Muskopf v. Corning Hospital District*, ante, p....., (55 AC 216) we held that the rule of governmental immunity may no longer be invoked to shield a public body from liability for the torts of its agents who acted in a ministerial capacity. But it does not necessarily follow that a public body has no immunity where the discretionary conduct of government officials is involved. While, as pointed out in the *Muskopf* case, a governmental agent is personally liable for torts which he commits when acting in a ministerial capacity, a different situation exists with respect to discretionary conduct. Because of important policy considerations, the rule has become established that government officials are not personally liable for their discretionary acts within the scope of their authority even though it is alleged that their conduct was malicious. * * *

"The immunity of the agency from liability for discretionary conduct of its officials, however, is not coextensive with the immunity of the officials in all instances . . . [citation of authorities]. . . . Although it may not be possible to set forth a definitive rule which would determine in every instance whether a governmental agency is liable for discretionary acts of its officials, various factors furnish a means of deciding whether the agency in a

particular case should have immunity, such as the importance of the public function involved, the extent to which governmental liability might impair free exercise of the function, and the availability to individuals affected of remedies other than tort suits for damages."

It would seem, then, that the Supreme Court has not discarded sovereign immunity entirely, but apparently has substituted the test of "discretionary-ministerial" for "governmental - proprietary"; and has attempted to outline a criteria for the application of that test.

The *Muskopf* and *Lipman* decisions received prompt attention from the State Legislature, then meeting in its 1961 regular session. Senate Bills 651, 1163, 1031 and 208 were introduced along with Assembly Bills 761 and 446. Of these, the two most important were Senate Bills 651 and 1031; the former being an attempt at a comprehensive tort liability act, and the latter a temporary suspension of the effect of said decisions and a reversion to the status quo in order to enable the Legislature to formulate a more complete and definitive legislative policy with respect to the entire matter of governmental immunity at its next regular session. Senate Bill 651, after amendment, failed of adoption; but Senate Bill 1031 passed, and was signed into law by Governor Brown on July 12, 1961, becoming Chapter 1404 of the California Statutes of 1961. This statute adds Section 22.3 to the Civil Code and provides essentially that governmental immunity from tort liability as it existed in California on January 1, 1961 is reenacted as a rule of decision in the courts of this State until the 91st day after the final adjournment of the 1963 regular session of the State Legislature.

It remains to be seen whether the courts will interpret this statute as effectively suspending the decisions of the *Muskopf* and *Lipman* cases. However, there is no reason to assume that the courts will not do so even though the legal effect of the statute can be debated; for the statute appears to adequately preserve any right of action accruing during the interim which might otherwise be lost. In any event the governmental tort liability problem on both a statewide and local government level should now be given our most serious attention.

The first step in this regard is recognizing the scope and extent of governmental tort responsibility or immunity as such existed in the State on January 1, 1961.

Briefly and essentially such responsibility or immunity was (and apparently still is) as follows:

1. Both the State and local governmental agencies are immune from tort liability for acts or omissions of their officers and employees performing governmental functions, but are responsible for such acts and omissions, subject to the rules of liability imposed upon private persons and the defense of ultra vires, in the performance of proprietary functions. (*People v. Superior Court*, 29 Cal. 2d 754, 40 ALR 2d 919).

While this dichotomy has often been critized by legal educators, the California appellate courts have, until the *Muskopf* case, followed it, particularly with respect to local governments. So likewise have the appellate courts in many other states. (Annotation in 40 ALR 2d 927-933). In its defense it might be said that most of the criticism of the rule springs from a scholarly but unrealistic attempt to

(Continued on Page 431)

Tax Traps in Stock Redemption Agreements

By MYRL R. SCOTT

Mr. Scott graduated from Stanford University Law School in 1955, and is a member of the Los Angeles County Bar Association Committee on Taxation. He is a partner in the Los Angeles firm of Sheppard, Mullin, Richter & Hampton.

» » NOW THAT MOST OF THE SMOKE AND FIRE caused by a series of recent cases dealing with stock redemption agreements funded with life insurance policies has cleared away, a critical examination should be made of all similar existing agreements which have been filed away for the day when a shareholder passes away.

The income tax impact on the shareholders, if any, with respect to the payment of insurance premiums by the corporation would fall under the provisions of Section 301 of the Internal Revenue Code. This Section provides that a distribution of property made by a corporation to a shareholder with respect to its stock shall be treated as a dividend.

Casale v. Comm'r., 26 T.C. 1020 (1956) rev'd by 247 F.2d 440 (C.A.-2, 1957) did not involve a stock redemption agreement, but rather a combination life and annuity contract which insured the life of the president and majority stockholder in order to fund a deferred compensation agreement. The corporation owned the policy, but because the stockholder had the right to designate who would take the policy proceeds in the event of his death, the Tax Court held the premiums paid by the corporation were dividends to the stockholder. The Second Circuit rescued Mr. Casale and in so doing stated that even though he controlled it, he was not the corporation. The Court stressed that although the deferred compensation agreement was for his benefit, he might never receive the proceeds of the annuity since the policy was exposed to the claims of creditors and the benefits were not specifically earmarked for him. The clear distinction made between the corporate obligation and the insurance purchased to fund it was very helpful to the taxpayer's case.

The next taxpayers into the trap were Messrs. Prunier in the case of *Prunier v. Comm'r.*, 28 T.C. 19 (1957), rev'd by 248 F.2d 818 (C.A.-1, 1957). Therein brother H was named as the beneficiary of policies insuring the life of brother J, and J was similarly named under policies insuring H. The corporation had no rights in the insurance, except such rights as were cre-

ated by the corporate minutes which recited that in the event of the death of either brother, the proceeds of the insurance on his life should go to the corporation to be used by it to buy the stock of the deceased brother. The Tax Court held that the premium payments constituted constructive dividends to the brothers. This time it was the First Circuit which saved the taxpayers by holding that, viewed as a whole, the corporation really owned the insurance, and that the insurance really had to be used to fund the corporation's agreement to purchase the decedent's stock.

In *Sanders v. Fox*, 147 F.Supp. 942 (1957), rev'd by 253 F.2d 855 (C.A.-10, 1958) the corporation and its four shareholders entered into a formal stock redemption agreement funded by life insurance. The premiums were paid by the corporation, but the shareholders had the right to designate the beneficiary of the policy insuring his own life. The estate of a deceased stockholder was bound to surrender the decedent's stock in return for the full proceeds of the policy. The District Court did the taxpayers in on a vague theory of comparative benefits, holding the primary benefit flowed to the stockholders. The Tenth Circuit reversed holding that, although a stock redemption plan has advantages to both the corporation and its shareholders, the test of weighing ultimate benefits was too impractical. The Court in effect held that when the insurance is owned by the corporation, the premiums paid thereon cannot be classed as constructive dividends.

The Service has acquiesced in these cases in Rev. Rul. 59-184, and in doing so has made it clear that in the conventional case where the corporation made the agreement, owns the insurance in every respect, and names itself as the beneficiary, the premium payments will not be regarded as dividends to the stockholder.

However, the reversal of the aforementioned cases should not cause any fanciful planning. The most cautious approach would be to draft the "Buy-Sell" agreement in such a way that it does not tie into the insurance fund, or even mention it as such if at all practical. In any event, where insurance is used to finance the "Buy-Sell" agreement, whether mentioned or not in the agreement, it should be wholly owned by the corporation, an asset available to the creditors, and the corporation should remain the purchaser and beneficiary of the policies. Any inclination to restrict the corporation's right to deal with the policies should be firmly resisted. Therefore, in reviewing existing "Buy-Sell" agreements, and in drafting future similar agreements keep the hot little hands of the stockholders entirely out of the policies to avoid having their fingers burned in a most unexpected manner.

Applications

The following applications for membership and reinstatement will be considered in the near future by the Membership Committee and the Board of Trustees:

APPLICATIONS FOR MEMBERSHIP

David Blair Allen
John Dean Barrick
Wilbur D. Garber
Earl Leslie Hanson
Gerald Maurice Hilby
Charles J. Hunt, Jr.
William Chandler Jennings
Darrell Lee Johnson
David V. Kenyon
William Landis
Dean Merton McCann
James A. McKechnie
Marvin Osburn, Jr.
Anthony Walter Paonessa
John A. Sage
John W. Simpson
Richard William Strong
Charles Stimmel Vogel
James Edward Whetmore
Nat Wilk

APPLICATIONS FOR REINSTATEMENT

Lawson M. Brown

You are requested to advise the Membership Committee of any information concerning the above that would be of value to the Committee and the Board of Trustees, and you may rest assured that any information furnished will be regarded in strict confidence.

MEMBERSHIP COMMITTEE

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notes from your Law Library

by JOHN W. HECKEL • Head Reference Librarian, Los Angeles County Law Library

THE CALIFORNIA ADMINISTRATIVE CODE

» » AN ATTORNEY CONFRONTED WITH A CITATION to the *California Administrative Code* is apt to search his set of Deering or West Codes and be baffled by his failure to locate his reference. Both the annotated Deering and West Codes contain references to the *Administrative Code* following the statutory authority. The *Administrative Code* is not a codification of legislative enactments. It is a codification of the rules and regulations of administrative agencies. Even though it was authorized twenty years ago, the *California Administrative Code* is not well known.

The growth of administrative agencies in the 1930's created many problems. On the national scene, the *Hot Oil* Case (243 U.S. 388) revealed the shocking lack of system in the promulgation and availability of Federal regulations. The result was the establishment of the *Code of Federal Regulations* and the *Federal Register* to keep it current. A 1936 decision in California, *Standard Oil Co. v. Board of Equalization* (6 Cal. 2d 557) demonstrated a similar need in the field of state administrative procedures. The State Bar Committee on Administrative Agencies and Tribunals began making studies, as did the Judicial Council.

The late Vernon M. Smith, Law Librarian at the University of California made a study of the best method of publishing administrative regulations. His proposals were adopted by the State Bar. On January 24, 1941, Senate Bill 742 was introduced by Senators Kuchel of Orange County, Kenny of Los Angeles County, and Keating of Marin County. When finally signed by the governor, it set up a Codification Board to which all administrative regulations were required to be filed for publication and codification. The legislature in 1943 appropriated $70,000 for the publication of the *Code* but it was not until 1945 that this was accomplished. The original Codification Board was replaced in 1947 by the Division of Administrative Procedure of the Department of Professional and Vocational Standards.

The *California Administrative Code* now consists of 24 titles in loose-leaf binders for easy supplementation. All regulations are published with a few exceptions. The Department of Social Welfare manuals are published separately, as are the General Orders of the Public Utilities Commission.

Some of the most used titles are:

Title 4, Business Regulations which includes alcoholic beverages, the Athletic Commission, the Horse Racing Board and others.

Title 8, Industrial Relations contains labor law enforcement and safety orders for industry.

Title 10 covers the Commissioner of Corporations' regulations for the issuance of securities as well as the insurance, savings and loan, and real estate commissioners' regulations.

Title 13, Motor Vehicles, deals with registration of vehicles and drivers' licenses.

Title 16, Professional and Vocational Standards includes such varied groups as accountants, private investigators, barbers, dentists, physicians, nurses, dry cleaners, etc.

Title 18, Public Revenues covers tax regulations.

How does one find the law in the *Administrative Code*? In the absence of a general index, one must check through the subject matter list of titles or the alphabetical list of agencies included in the front of the *Code* until he finds the relevant title or agency. Newer agencies such as the Fair Employment Practices Commission or the Psychology Examining Committee of the Board of Medical Examiners are not listed and must be searched for through the *Code*.

The *California Administrative Code* is kept current by the *California Administrative Register* which corresponds to the *Federal Register* with the exception that it does not print proposed regulations, and is issued only twice a month. The regulations it prints are published several weeks after filing. Occasionally whole titles are revised, as when a new Education Code required a new *Administrative Code* Title 5.

Each section or chapter contains a history showing the effective date of the section, the dates on which it has been amended and the citation of the *California Administrative Register* where it was first published. The *Ad-*

ministrative Code contains only current regulations. For the prior reading of a section, earlier *Registers* must be checked.

Since 1955 it has been possible to shepardize the *California Administrative Code* for interpretative cases and Attorney General opinions. The *Code* section appears at the end of the Statutes volume of *Shepard's California Citations.*

The *California Administrative Code* is not published commercially. It is available only from the Documents Section of the State Printing Office, Sacramento 14, California. A complete current set, assembled in ring binders sells for $125.00 plus sales tax. Individual titles may be purchased for prices which depend on the size of the title. Thus, an attorney who does a good deal of corporation work would want to purchase only Title 10. It sells for $5.72 including the sales tax. The *Register* may be subscribed to with a deposit of $25.00. When the deposit is exhausted, a new deposit will continue the subscription.

Availability of the *Code* and *Register* to the public and the legal profession is assured by a requirement that copies be deposited in the office of the County Clerk in each county, or in the county law library or the county library.

The attorney in California is fortunate to have his needs for administrative regulations met in such a satisfactory manner. A few states such as Indiana, Iowa and Michigan, make provision for the publication of administrative rules, but none can compare with the work done by the Division of Administrative Procedure. New York, this year, has begun the publication of a loose-leaf, supplemented set of *Codes, Rules and Regulations* similar to the *California Administrative Code.*

BAR ACTIVITIES

Calendar

Los Angeles County Bar Association

Committees

October 25—Corporate Law Departments, 12 noon.

October 26—Continuing Education of the Bar, 5:00 p.m.

Sections

October 26—Probate and Trust Law luncheon, Conference Room #1, Biltmore, 12 noon.

Affiliated Associations

October 12—Pomona Valley Bar Association, Huddle Restaurant, Covina, 6:30 p.m. Speaker, Bernard E. Witkin, authority on evidence and procedure.

October 17—Beverly Hills Bar Association, Beverly-Wilshire Hotel, 12 noon. Speaker, Governor Edmund G. Brown.

Glendale Bar Association, Pike's Restaurant, 7:30 p.m. Speaker, Howard Theland. Topic: Highlights of the 1961 Legislature.

San Fernando Valley Bar Association, Pucci's Restaurant, 7:30 p.m. Speaker: Dr. Leo Gelfand. Topic: "Medical Fish and Legal Waters."

Southeast District Bar Association, King's Restaurant, 6:30 p.m.

October 18—Pasadena Bar Association, Huntington-Sheraton Hotel, 7:00 p.m. Speaker, W. Cleon Skousen. Meeting with Pasadena Medical Society and San Gabriel Dental Society.

October 20—Compton Judicial District Bar Association, Dow-Ray Restaurant, 7:00 p.m. Speaker, Elmer Low. Topic: "The Role of the Doctor and the Lawyer." Each member is asked to bring a doctor guest.

American Bar Association

February, 1962 — Mid-Winter Meeting, Chicago, Illinois.

August 6 to 10, 1962—Annual meeting, San Francisco.

(Official announcements concerning events of interest to members of the Los Angeles County Bar Association and its affiliated bar associations will be included in the Calendar as space permits. The deadline for submission of dates is the 20th of the prior month. Please send information to the office of the Bar Association.)

Association Sponsors New Lecture Series On Family Problems

The Los Angeles County Bar Association is again sponsoring the State Bar's continuing legal education program. The Fall 1961 lecture series is on "Legal Problems of California Families." It will be given as listed below.

Members will have their choice of attending either a weekend or weeknight session.

Weeknight Session
Tuesday-Thursday—7:30 p.m.

Location:
Auditorium, California Teachers Association, 1125 West Sixth Street, Los Angeles, California

Date		Subject	Lecturer
October	17	1. Family Property Rights and Liabilities	Robert S. Butts
October	19	2. Preliminary and Uncontested Divorce Proceedings	C. Clinton Clad
October	24	3. Property Settlement Agreements	Guy K. Claire
October	26	4. Enforcement and Modification of Judgments	Judge John F. McCarthy

Weekend Session
Friday-Saturday

Location:
Auditorium, Union Oil Center, 461 South Boylston Street, Los Angeles, California

Date	Subject	Lecturer
November 3 1:30 p.m.	1. Family Property Rights and Liabilities	Professor William E. Burby
November 3 3:45 p.m.	2. Preliminary and Uncontested Divorce Proceedings	Rubin M. Lazar
November 4 9:00 a.m.	3. Property Settlement Agreements	Edward M. Raskin
November 4 11:15 a.m.	4. Enforcement and Modification of Judgments	E. Loyd Saunders

The registration fee is $20. Each registrant will be mailed the 1000-page handbook CALIFORNIA FAMILY LAWYER as soon as it is delivered by the printer in January 1962. It is to your advantage to register now, for the price of the handbook after the series ends on December 1, 1961 will be $37.50.

Following is a registration form. Your check and registration form should be sent to University Extension, Department CEB-R, Berkeley 4, California. If you have any questions, please communicate with your Los Angeles Bar Association representative who is Harold S. Voegelin, Esq., 611 Wilshire Boulevard, Los Angeles 17, California (MA 5-5731).

REGISTRATION FORM
LEGAL PROBLEMS OF CALIFORNIA FAMILIES

Please register me in the Continuing Education of the Bar Program for the Fall 1961 lecture series at Los Angeles.

Name_____
Please print

Address_____
Please print

Telephone_____

Weeknight Session (1125 West Sixth Street) ☐
Weekend Session (461 South Boylston Street) ☐

I enclose check or money order for $20.00 to THE REGENTS OF THE UNIVERSITY OF CALIFORNIA.

I am a member of the State Bar of California.

_____
Signature

sult in the estate or its beneficiaries receiving a lower price due to a forced sale by one or the other to raise money in order to pay such death taxes. Furthermore, such a taxpayer's widow might be left with no more than the family residence and such stock. The latter will do her little or no good in maintaining by herself the household which her deceased husband, on whom she can no longer rely, formerly supported entirely by himself.

Another factor to consider here is that the seller might not otherwise elect to put as much into this type of a stock if he were free to invest a like amount of cash. The desire to minimize income taxes should not be allowed to distort a sound investment portfolio. Some companies that might acquire the stock would be acceptable, but most companies probably would not be acceptable from this standpoint. For example, if IBM proposed such an offer, a taxpayer would undoubtedly accept. A company whose stock was less attractive, on the other hand, and which made such a proposal, should be turned down. In the latter case, taking cash, paying the tax, and investing in several growth stocks on one of the exchanges, would make more sense.

In terms of this example, suppose the seller had a basis of $100,000 for his stock, and the acquiring corporation is willing to pay $500,000 for his stock, either in cash or in acquiring corporation stock. Assuming the seller has held his stock for more than 6 months, and is in a bracket where the maximum capital gains tax is 25%,[7] if he were to take cash he would have a long term capital gain of $400,000, would pay tax of $100,000, and would have $400,000 ($500,000, sales price, less $100,000 tax) left after taxes. If the acquiring corporation paid 4% in cash dividends every year and he were to take acquiring corporation stock, his $500,000 of acquiring corporation stock would bring him $20,000 in dividends annually. In order to realize $20,000 on his $400,000 of after tax dollars the seller would receive in a sale of his stock for cash, he would have to invest the $400,000 at a 5% return after taxes. The difference of only 1%, taken in conjunction with the other economic factors discussed above, might point to the seller going the taxable route, rather than the non-taxable (tax-deferring) reorganization route.

Let us take this illustration another step in order to demonstrate the growth potential factor. If the acquiring corporation stock is such that its appreciation in value as an investment each year is 6%, $500,000 of such stock will appreciate $30,000 each year. In order for $400,000 of after-tax dollars to appreciate in value $30,000 a year, it must be invested in an item or items with a yearly increment in value of 7.5%, or a 1.5% greater appreciation. This difference likewise does not justify deferring the tax where other financial and economic factors point to refusing the stock for stock exchange.

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[7]Taxpayers reach the alternative capital gains tax as follows:

Status	*Taxable Income*
Single	$16,000
Head of Household	$24,000
Married	$32,000

III. Low Basis Property Held Until Death

Where an elderly taxpayer holds property in which he has a low cost or basis, often, rather than sell the property and pay the tax on the sale, the taxpayer may decide to hold the property until his death. He will thus avoid completely the income tax on the gain on the sale. The property will, however, be includible in the taxpayer's gross estate, and therefore be subject to federal estate and state inheritance taxes.

The primary considerations here also should be in areas other than the amount of income taxes to be avoided. The first inquiry should be as to the soundness of the current high price, and the possibility of its decreasing. Tied in with this is the chance that the price will remain the same in the future, or that it will rise at a rate lower than that of another comparable investment available at the time, taking into account the fact that the other investment will be only with after-tax dollars. Here again the availability, soundness, growth potential and yield of other investments should be key factors to be considered in making the decision.

In terms of this example, assume that the taxpayer has undeveloped real estate with a basis of $70,000 and a fair market value of $170,000. If the real estate will appreciate at a rate of 6% per year, the taxpayer is earning $10,200 every year (calculated by taking 6% of $170,000, the value at the date the decision is being made as to whether or not to sell). On the other hand, if the taxpayer were to sell the property, which we will assume is a capital asset in his hands and has been held for more than 6 months, and receives $170,000, he will have a long-term capital gain of $100,000, and a tax[8] of $25,000, leaving him a net of $145,000 after-tax dollars ($170,000 sales price, less $25,000 tax). In order to earn $10,200 per annum on $145,000 of investment, the yield after taxes must be 7.0345%, or 1.0345% more return. Where other factors exist, the tax avoidance by way of retention of the asset should be forsaken in favor of the taxable sale of the property.

This is one situation in which another tax factor might enter the picture, namely the availability of the provisions of Section 1031 of the Internal Revenue Code. This section permits property held for productive use or investment by a taxpayer to be exchanged for property of a like kind, to be held either for productive use or investment,[9] without the recognition of gain (except to the extent the fair market value of unlike property received exceeds the basis of the property given up). Thus property with a poor investment potential can be exchanged for property with a good potential, without the recognition of any gain and, therefore, without the payment of any income tax. Here again, however, business reasons might dictate an outright sale, payment of the tax, and reinvestment of the after-tax proceeds. The non-tax factor here might be a better bargaining position, namely, more flexibility in having cash with which to purchase new property, rather than

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[8] Again assumes taxpayer is in the alternative capital gains bracket. See text accompanying footnote 7, supra.

[9] Treas. Reg. §1.1031(a)-1(b) indicates that like kind has reference to the nature or character of the property and not to its grade or quality. The decided cases under this section have been liberal in the exchanges which they found qualified for non-recognition of gain.

only land to exchange for it. The number and quality of parcels of property available will certainly be higher in the situation where the potential purchaser has cash to use as the medium of payment, rather than only land.

Conclusion

The above examples are by no means exclusive; any practitioner can add his own cases to those analyzed above. In addition, the number of non-tax factors present in any given situation is often large.

This article is in no way intended to negate or minimize the importance of the tax incidents of business transactions; nothing could be further from the truth. It is, however, intended to point out that tax aspects should be put in their proper prospective relative to financial dealings, no higher and no lower. The tax aspects should be only one consideration; some of the others have been discussed above. Each situation will present its own non-tax factors. A businessman should never let the tax aspects overpower what would otherwise be a good business deal from an economic and financial standpoint.

There is a large responsibility placed on the tax attorney in this regard. This responsibility is to be an attorney with a complete and thorough knowledge of the tax laws and how they affect business transactions, and at the same time to be aware that tax aspects constitute only one consideration in arriving at a decision as to whether a particular proposed transaction is a beneficial one for his client.

secure uniformity in governmental tort liability among the several states; and by an often irrelevant comparison of the many differences among the states in what is and what is not considered to be a "governmental function." For example, a wide dispute exists in the United States with respect to the operation of public parks. Be that as it may, the use of such a test has and will, unless rectified by legislative declaration, cause continuing problems of definition and redefinition for the judiciary within as well as among the states as the scope, size and activities of governments grow.

While the California courts have consistently held that governmental functions were essentially those activities related (1) to the making and enforcement of laws of general application, such as police and taxing statutes, and (2) to the performance of services not ordinarily performed by private persons, our courts have only relatively recently held that the State, as distinguished from a city, could engage in (and, therefore, be held responsible for) so-called proprietary activities (*People v. Superior Court*, supra, 1947; *Guidi v. State*, 41 Cal. 2d 623, 1953).

2. The State and local governmental agencies may, by statute, be held liable for the negligent operation of motor vehicles, including emergency vehicles (Vehicle Code Section 17001).

3. Local governmental agencies (but not the State) may, by statute, be held liable for the negligent maintenance of public property under certain circumstances (Government Code Section 53051), and property damage caused by mobs or riots. (Government Code Section 50140.)

4. The State and local governmental agencies are also held accountable for the creation or maintenance of a public nuisance even where such involves a governmental function. (*Phillips v. City of Pasadena*, 27 Cal. 2d 104.)

5. Public officers and employees are responsible, like private persons, for their intentional or negligent torts, in the performance of ministerial acts, including false arrest (even though arrest usually involves the exercise of discretion), but not malicious prosecution. (*Coverstone v. Davies*, 38 Cal. 2d 315; *Dragna v. White*, 45 Cal. 2d 469.) They are immune, however, even where malice is alleged, in the performance of discretionary acts within the scope of their authority (*Hardy v. Vial*, 48 Cal. 2d 577). Such "authority" has been held to include not only acts essential to the accomplishment of the main purposes for which the office was created but also to acts which, although only incidental and collateral, serve to promote those purposes. (*White v. Towers*, 37 Cal. 2d 727, 28 ALR 2d 636). There is no recent authoritative judicial interpretation in California of the term "discretionary" as used in this context, however it has long been the rule in mandate cases that the exercise of judgment is the critical factor. (*Jenkins v. Knight*, 46 Cal. 2d 220.)

6. Public officers and employees are also specifically exempted by statute from liability in the operation of emergency vehicles in law enforcement or fire prevention in the line of duty (Vehicle Code Section 17004); for public money stolen from their

custody unless they failed to use due care (Government Code Section 1953.5); for the acts of their subordinates in a civil service system unless they failed to use due care in selection or supervision (Government Code Sections 1953.6 and 1954); and for acting in good faith and without malice under the apparent authority of a statute later declared to be unconstitutional. (Government Code Section 1955). However, they are, by statute, liable for the negligent maintenance of public property, under certain circumstances, if the injured person can show "due care" on his part. (Government Code Section 1953).

While this statement of governmental tort liabilities and immunities in California is over-simplified, such over-simplification is necessary because of the limited scope and length of this paper.

With this background in mind, we can now turn to the heart of the matter and suggest a possible solution to the problem.

In view of the decisions of the Supreme Court in the *Muskopf* and *Lipman* cases and the provisions of Chapter 1404 of the California Statutes of 1961, it would appear that there are three principal choices to the solution of this problem. The entire matter can be left to the courts by failure of the Legislature to enact appropriate statutes by the close of its 1963 session. The Legislature can meet the specific challenge of these decisions by enacting *limited* statutes adding to those now on the books. Or, the Legislature can enact a comprehensive tort claims statute covering the entire subject and, insofar as they are contradictory, repeal the present statutes now dealing with the problem and scattered throughout the several Codes.

For the sake of obtaining reasonable certainty and uniformity within

the State and in the interest of the reduction in the confusion and interminable litigation which will necessarily follow the adoption of either of the first two alternatives, (9 Law and Contemporary Problems, 181-370, 142) the Legislature should enact a comprehensive statute covering both the liability for and immunity from the torts of the State, local governmental agencies and their officers and employees.

Inasmuch as the Legislature has only recently (by Chapters 1724 and 1712 of the California Statutes of 1959) enacted a general claims statute and has placed it in Division 3.5 of Title 1 of the Government Code, such a comprehensive "public liability" statute might be placed most expeditiously in this same Division.

Because of the existence of an ample background of judicial review, interpretation and administration thereof, such a statute might be patterned after the Federal Tort Claims Act (28 USC 1346 (b) 2671-2680), but also retain the essential features of the present California statutes on the subject, such as Sections 53050 and 1950, et seq. of the Government Code, and Sections 17000, et seq. of the Vehicle Code.

In general, such a comprehensive California Tort Liability Statute should include:

1. A declaration of policy to the effect that this statute shall have statewide application and shall provide the exclusive remedies and rights of redress for governmental torts.

2. A determination with respect to the civil procedure to be followed.

It is believed that a statewide administrative agency, like the Industrial Accident Commission, need not be established at this time, but that the jurisdiction of such actions should remain in the appropriate courts of the State, including the right to request trial by jury. (Government Code Section 642 now provides that the rules of practice in civil actions apply generally to all actions against the State upon such claims as are now permitted.)

Based on the past experience of local governmental agencies in the State (which have handled the majority of governmental tort cases to date), any litigation which results from public liability for certain torts (as provided in the Statute) should be adequately handled by the courts without the necessity for creating another costly administrative agency, the decisions of which could, like those of the IAC, be appealed to the courts in any event.

Thus, for example, in a major field of public liability shared by both the State and local governmental agencies at the present time, auto liability, the State's largest City, Los Angeles, has had the following recent claims and litigation experience:

Fiscal Year	*Vehicle Accident Reports Processed*	*Vehicle Claims Filed*	*Motor Vehicle Litigation Actions Filed*
1959-60	2827	630	87
1958-59	2368	775	93
1957-58	2618	773	106
1956-57	2033	431	67
1955-56	1971	439	63

*These figures do not include the proprietary departments such as the Departments of Water and Power, Airport and Harbor.

If subsequent experience proves otherwise, then California could adopt a system similar to the New York Court Claims Act (Ch. 467 of the NY Laws of 1929, as amended by Ch. 860 of the NY Laws of 1939), or adopt the system established by the Federal Tort Claims Act which permits such actions to be tried only by a court without a jury (28 USC 2402).

With respect to the retention of trial by jury; there is no requirement of a jury trial nor even of a court trial for such matters (*U.S. v. Babcock*, 250 US 328; *Podzuweit v. State*, 78 N.Y.S. 2d 108, N.Y.); and in fact no right to jury trial with respect to claims against the *state* has commonly been afforded in the United States except in the field of eminent domain. (Leflar and Kantrowitz, "*Tort Liability in States*," 29 N.Y. Univ. Law Rev. 1363.) However, it is believed that the right to jury trials should be retained in such actions so long as the courts are able to handle the litigation adequately. The right to a jury, especially to try civil damage suits, is one of the cornerstones of the common law tradition of this nation. It enables both plaintiff and defendant the greatest freedom in the trial of their lawsuit, and in the case of a public agency, allows the government's attorneys the privilege of submitting to the citizen taxpayers of the agency the decision of the question of governmental responsibility for tort liability in individual cases. This will, if the past experience of governmental agencies is borne out, have the salutary effect of reducing governmental tort litigation (and expense) to those cases having at least some merit in fact, and of placing the responsibility of the awarding of money judgments

against the government upon the people who will ultimately pay for them. Permitting trial by court alone, as in the Federal system, or by administrative tribunal, as in industrial accident cases, tends to create a system of public insurance for the claims in question, rather than the rigorous assessment of the facts relating to individual cases on their merits as should be demanded by the government and the taxpayers who support it.

3. A clear declaration and statement of the tort liability to be accepted by the State, its agencies and political subdivisions, including the responsibility to be undertaken for the acts or omissions of governmental officers and employees. Such a statute might include the essential provisions of Section 50140 and 53051 of the Government Code, and Section 17001 of the Vehicle Code. See also Ordinance No. 119,869 of The City of Los Angeles adopted August 31, 1961 providing for the acceptance of tort liability under certain conditions by the City for damage or injury caused by the acts of city employees in the course and scope of their employment.

It is suggested that if the provisions of Section 53051 of the Government Code imposing liability upon local government agencies for the negligent maintenance of public property in certain instances are included, they be amended to limit such liability to dangerous or defective conditions where the resultant damage or harm is "foreseeable" and there is actual knowledge of the condition, not mere constructive notice, except where the agency caused or created the defect. The State as well as local governmental agencies should be held responsible for such conditions. Moreover, a provision should be added to provisions relating to liability for dangerous or defective conditions of public property to permit the introduction of evidence relating to "past occurrences," both as to the lack or existence of previous accidents resulting from such conditions, where otherwise relevant. Such evidence may be exceedingly helpful, particularly in slip and fall cases, and would provide a useful background for weighing the testimony of the various witnesses. (See *David, "Tort Liability of Local Government,"* 6 UCLA Law Rev. 1.) If, as the courts tell us, the government is not an insurer (*Whiting v. City of National City,* 9 Cal. 2d 163), and unless the people of this State decide that their governments are to be insurers, the methods of proof should be such that the injured party be made to prove his case and that the government be able to disprove it without being forced to rely upon the defensive proof of contributory negligence or assumption of risk.

It is believed that the provisions of Government Code Section 1953 imposing liability upon public officers and employees for their negligence in the maintenance of public property in certain instances should not be included in such an omnibus tort liability statute. If such a statute includes liability for such conditions on the part of the responsible public agency, adequate redress is available to the injured person. The conditions imposed upon liability by Section 1953 and not contained in Section 53051 (such as a showing of due care by the plaintiff and that the defendant officer had the authority and financial ability to correct the defective condition) generally preclude a showing of liability on the part of the officer or employee at the present time anyway.

4. A clear statement and declaration of the extent to which the State, local governments and their officers and employees are immune from or not responsible for tort liability, including definitions of terms (such as what constitutes "governmental functions" and "official discretion"), so that the courts will not be again faced with the task of deciding whether by accepting liability in certain circumstances all governmental immunity has thereby been waived.

It is suggested that such immunity follow the general lines of sovereign immunity from tort liability as it existed in California before the Muskopf case (i.e., for governments based upon the nature of the function being performed, governmental or proprietary; and for governmental officers and employees based upon the nature of the activity being carried out, ministerial or discretionary).

While inequities may result from granting sweeping immunity to governmental officers and employees exercising discretionary activities, the reasoning and trend of judicial authority in support of such immunity is inescapable. Thus, in the often cited case of *Gregoire v. Biddle,* 177 F. 2d 579, the late Learned Hand states at page 581:

"It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded upon a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in balance between the evils inevitable in either alternative."

Inasmuch as a government and its agencies (which are merely creatures of law having no personal substance) can commit a tort only by reason of the acts or negligence of their officers and employees, Judge Hand's well-accepted reasoning may also be applied to the immunity granted to the state. For example, the principal reason for the retention of "official immunity" is that the public interest demands that public officers and employees execute and administer their discretionary duties independently and without fear of reprisal. Such public interest may well be defeated as much by holding the governmental agencies responsible for the discretionary acts or omissions of their officers and employees as by holding the officers and employees personally liable for such acts or omissions. For it is not inconceivable that if the government is held liable for the discretionary conduct of its officers and employees, the government will take steps to restrict the independence of these persons or eliminate entirely

the services or responsibilities which they perform.

It is often argued that a government, like a private corporation, should not escape responsibility for injuries or damage which results from the torts of its officers and employees acting within the scope of their employment. However, a government is not like a private corporation. It is a political entity created by its constituent citizens essentially for political purposes. Therefore, when it exercises or performs those functions which its citizens have delegated to it for the protection and promotion of their health, morals, safety and well being, they should not have to bear the double burden of paying for the performance of these politically created functions and also for any injury or damage which may result therefrom. Moreover, because it is impossible to know whether tort claims against a government are well founded until the cases are thoroughly investigated and in many cases even tried, our taxpaying citizens would, unless immunity existed, be forced to pay an additional amount for the operation of their government: the expense of handling such claims and the litigation which will inevitably result from them.

This latter "hidden cost" of the acceptance of tort liability is not inconsiderable. Thus, in the 1961-62 Budget for the City of Los Angeles alone, $169,635 is budgeted for the *administration* of the Public Liability Division of the City Attorney's Office and $172,336 is budgeted for the administration of that Office's Automobile Liability Division to process and defend claims against the City's non-proprietary departments primarily under

Government Code Section 53051 and for false arrest, and Vehicle Code Section 17001, respectively. What these administrative cost figures would be if general public liability were assumed cannot be forecast. In any event even these costs are considerably lower than insurance premiums to provide the required coverage. Needless to say, such costs, when multiplied by the number of governmental agencies in California and projected into the future expansion of governmental activities throughout the State should not be ignored.

While the retention of immunity in certain cases (especially with respect to governmental agencies) may prove distasteful to those who feel that as long as "big brother is watching over us" from the cradle to the grave He might as well be tagged with insuring His conduct in all respects, it is submitted that the citizens and taxpayers of this State should not be held financially responsible for the sometimes tortious conduct of those affairs of government which are necessary for their safety and welfare. In such cases the argument for "spreading the risk" appears to defeat itself.

With the sole exception of the State of New York, no state has seen fit thus far to waive immunity entirely. Some accept no liability. (Leflar and Kantrowitz, *"Tort Liability in States,"* supra.) Moreover, immunity has specifically been retained in the Federal Tort Claims Act with respect to many categories of "governmental" activities including prosecution and arrest (28 USC 2680); and by the United States and several states, including California, with respect to civil defense activities under the Interstate Civil Defense and Disaster Compact. (50 USC 2251; California Military and Veterans Code Sections 1535.8, 1587, 1591.)

Specific immunities such as are now contained in the State's public liability statutes might also be included if

general provisions cannot be drafted to adequately cover the field. For example, specific immunity sections for public officers and employees might be necessary to correspond with the present provisions of Sections 1953.5, 1953.6, 1954, 1955 and 1957 of the Government Code, and 17004 of the Vehicle Code.

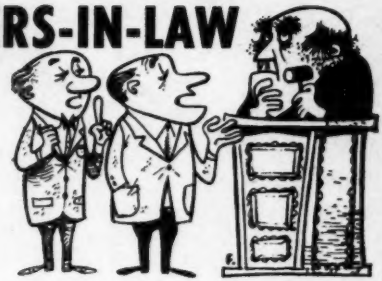
In this connection, it is suggested that specific immunity for police and other law enforcement officers for false arrest be included in the statute. While, as previously stated, police officers have been held accountable for false arrest in California prior to the *Muskopf* and *Lipman* decisions, their immunity now appears (at least arguably) to be within the contemplation of the *Lipman* decision, and comports with the reasoning underlying the well-settled judicial and official immunity for malicious prosecution and the administration of criminal justice. (*Norton v. Hoffman*, 34 Cal. App. 2d 189; *Bradley v. Fisher*, 80 US 335.) The cure or remedy here is not by way of civil damages recovered from individual police officers, but by removal of such officers by appropriate disciplinary procedures. Otherwise, as is the case today, especially in large, "target" cities, the administration of criminal laws and the prevention of crime must inevitably suffer to the detriment of all. Unfortunately there are no realistic statistics to support the obvious conclusion that peace officers will refrain from the vigorous enforcement of the law which is necessary to combat the alarming and continuing increase in the crime rate because of a fear of capricious personal liability.

5. Finally, such a statute should include provisions: (1) for subrogation of the governmental agency to the rights of the injured person against the negligent officer or employee (as is now provided by Vehicle Code Section 17002 with respect to auto liability cases); (2) for payment or settlement of claims and finality of judgments; and (3) for insurance against liability (as is now provided by Vehicle Code Section 17003 and Government Code Sections 1956 and 53056).

PERSONS WHO SERVED ON THE FEDERAL COURTS CRIMINAL INDIGENT DEFENSE PANEL DURING SEPTEMBER, 1961

Frank F. Behr
Arthur S. Bell
Wm. Matthew Byrne, Jr.
Anthony T. Carsola
Paul Caruso
Victor E. Chavez
William I. Chertok
Stanley Cohen
Dorothy K. Davis
Jerome J. Glaser
Nancy B. Goodman
George G. Gregory
Joe Ingber
Earl Klein
Stanley E. Laughlin, Jr.
Donald Perkal
Irven C. Ray
Richard Sobelle
Arthur Steinberg
Isabelle Trotti
John Joseph Walsh
Caryl Warner
Alan Wayte

BROTHERS-IN-LAW



By
GEORGE
HARNAGEL, JR.

Samuel Williston

Samuel Williston, the grand old man of Harvard Law School and exemplar par excellence of the Socratic method of teaching law, attained his one hundredth birthday this fall. He began to teach at Harvard in 1888, three years after he received his LL.B. there and continued as a member of its faculty for almost 50 years.

His name became synonymous with Contracts because of his monumental treatise on that subject, which was first published in 1919, and because of his long service as Reporter for the American Law Institute's *Restatement of the Law of Contracts,* of which he was the principal draftsman.

His work, however, was not limited to that field. A treatise on Sales preceded that on Contracts. He served as Massachusetts Commissioner for the Commission on Uniform Laws for almost twenty years and, for over twenty-five years, as draftsman of uniform laws on Sales, Bills of Lading, Warehouse Receipts and Stock Certificates. All the while he was pursuing a distinguished career as a law teacher.

In 1929 he received a gold medal from the American Bar Association for "conspicuous service in the cause of American jurisprudence", the first such award ever made by the Association.

Both his longevity and his enormous productivity are all the more remarkable in view of the fact that he suffered a nervous breakdown in the mid-nineties which disabled him for several years and which had after effects that plagued him more or less throughout his active life. In his autobiography, *Life and Law,* which was published in 1940, shortly before his eightieth birthday, he rather apologetically devoted a chapter to "Illness and Incapacity", commenting that it might be justified if it showed that "some achievement" was still possible even after years of illness that impose permanent limitations on one's endeavors.

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Many Thanks

The editor of this department must record his appreciation of the kindness of the 1961 Bulletin Committee in recently presenting him with a stoutly bound volume carrying this imprint: *Brothers-in-Law, et al., 1950-1960.* As the title suggests, it is a collection of the material which has appeared in this department from its inception in May, 1950, through April, 1960, as well as other pieces contributed to the Bulletin over that period.

Without in any way qualifying my expression of appreciation I must in candor say that my pleasure was measurably tempered when I dipped into the volume and reread some of the stuff I had written. My spirits revived a bit, however, when I realized that I wouldn't have to worry about anybody else doing that.